No. 38657-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD, A Municipal Corporation of the State of Washington,

Respondent,

Vs.

DAVID KOENIG, individually,

Petitioner.

RESPONDENT'S REPLY TO AMICUS, ALLIED DAILY NEWSPAPERS OF WASHINGTON, et al.

Matthew S. Kaser, WSBA # 32239
CITY OF LAKEWOOD
6000 Main Street
Lakewood, WA 98499-5027
Telephone: (253) 589-2489
Facsimile: (253) 589-3774
Attorney for Respondent,
City of Lakewood

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I. INTRODUCTION

Pursuant to this Court's *Order Granting Motion to File Amicus Curie Brief* (Sept. 27, 2010), the City of Lakewood responds to the brief of Amicus, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, the Tacoma News Tribune, the Tri City Herald, the Wenatchee World and the Washington Coalition for Open Government.

II. POINTS & AUTHORITIES

A. The Parties do not Dispute that a suit for Declaratory Relief is an Appropriate Mechanism to Litigate the Propriety of the City's Compliance with the PRA.

Many of the issues raised by amicus were not raised by Mr. Koenig at the Superior Court level. Several of the issues raised by amicus are also directly at odds with the positions taken by Mr. Koenig at the trial court level. Much of the amicus brief raises issues which the trial court never considered nor for which the trial court was supplied briefing.

1. Amicus' Request That the use of the UDJA be Restricted is Improperly Raised for the First Time On Appeal.

Neither the City nor Mr. Koenig raised the propriety of the use of the Uniform Declaratory Judgment Act, chapter 7.24 RCW (UDJA) as the appropriate procedural mechanism to bring this action. An appellate court does "not consider issues raised first and only by amicus." *Mains Farm*

Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993)(*citing*, *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984)). Amicus is the first and only entity which has contested the use of the UDJA as a cause of action. Their arguments should not be considered for the first time on appeal.

2. Mr. Koenig has not Disputed that a Declaratory Judgment is an Appropriate Mechanism in Verifying PRA Compliance.

Even if amicus' points on the UDJA are considered, the parties have agreed that the claim is entirely proper.

In its *First Amended Complaint* (CP 5-14), the City alleged as follows:

> 4.1 The parties have an existing and genuine dispute regarding a controversy whereby the judicial determination of which will have the force and effect of a final judgment.
>
> 4.2 The City of Lakewood is entitled to declaratory relief decreeing that the City's responses to Mr. Koenig's Public Records Act requests have been complete and in full compliance with the Public Records Act.
>
> 4.3 The City is entitled to prompt disposition of this matter under the Public Records Act and the Uniform Declaratory Judgments Act, chapter 7.24 RCW as a requestor may wait a full year before seeking judicial review of the City's response. Given the City's commitment to compliance with the Public Records Act, a ruling from the Court now would alleviate needless accrual of various statutory penalties which cannot be set aside later

(CP 7, ¶¶ 4.1-4.3).

Mr. Koenig's response to these allegations is best summarized in that portion of his *Answer* responding to the above allegations.

> Admitted in part and denied in part. The parties have an existing and genuine dispute only to the extent that Koenig is willing to litigate the issues raised in this action. As set forth in paragraph 3.5 (above) there is a genuine dispute as to whether the City property redacted driver's license numbers. All other possible violations of the City in response to Koenig's October 2007 requests are moot and/or nonjudiciable.

(CP 17, ¶ 4.1; Emphasis Added).

Also of note, Mr. Koenig raises no affirmative defenses, including the failure to state a claim upon which relief can be granted. CR 12(b)(6).

Even a cursory review of Mr. Koenig's materials filed with the Superior Court and this Court indicate that he disagrees with the fact that the City has commenced the instant action; a review of his *Answer* plainly reflects that he is willing to litigate the issue of the City's compliance with his October 2007 PRA requests.[1]

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[1] This is not that surprising, and further illustrates the beneficial use of discovery in establishing a party's prior position is the following colloquy between the Supreme Court and Mr. Koenig, culminating in *City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009):

> [Counsel for David Koenig:] In my case, the City filed a motion to establish that this record was not subject to disclosure under the Public Records Act, explicitly under the procedural provisions of the Public Records Act.
>
> [Court:] What do you think the correct procedure would be? A dec. action, maybe? A declaratory judgment?

3. The UDJA is an Appropriate Cause of Action.

As correctly admitted by Mr. Koenig in his *Answer*, the elements necessary to establish a UDJA claim in the PRA context are met in the case at bar. In order to establish a prima facie claim under the Declaratory Judgment Act, chapter 7.24 RCW, the Supreme Court observed:

> [I]n the absence of the intrusion of issues of broad overriding public import, steadfastly adhered to the virtually universal rule that, before the jurisdiction of a court may be invoked under the act, there must be a justiciable controversy: (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)(internal footnote omitted; additional citations omitted).

All four elements are readily met. (1) there are the mature seeds of a dispute as to the appropriateness under the PRA of the City's compliance

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> [Counsel:] I would not want to guess, frankly. But I think the point that is important to make is that the Public Records Act provides the analytical and procedural framework for these arguments and nothing could prove that point more clearly than two parties both trying to argue that the PRA didn't apply and both, consciously or unconsciously, falling back on using the PRA as the framework for making their point.

Wash. Supreme Court Oral Argument, *City of Federal Way v. David Koenig*, No. 82288-3 June 9, 2009), at 1 min., 59 sec. through 2 min., 26 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org.

with his October 2008 PRA requests, specifically, its redaction of driver's license numbers; (2) the dispute is between the City of Lakewood and a member of the public who is being affected or will be affected by the City's interpretation of the those exemptions applicable to Mr. Koenig's PRA claim against the backdrop of Mr. Koenig's failure to respond to the City's reasonable inquiry raises the issue of opposing interests; (3) the interests of the City are direct and substantial. As Mr. Koenig has demonstrated with two other jurisdictions and in prior litigation with the City, a requestor need not immediately commence suit to compel disclosure of allegedly wrongfully withheld documents, and the requestor may wait up to fifteen months before a governmental agency may know that that it erred, and if the agency is in error, per day penalties and attorney fees are mandatory for each day that the agency mistakenly believed it was in compliance; (4) finally, a judicial determination of whether or not the City has complied with the PRA will be final and conclusive as to the issue raised in this case.

The argument of Amicus has been raised and rejected previously, as well-stated by Division III of this Court:

> [Amicus, Washington Coalition for Open Government (COG)] argues that the District thwarted both the substance and underlying policy of the public disclosure act by taking the initiative and seeking a declaratory judgment (what COG calls a "rubber stamp" ruling). COG argues that

> the public disclosure act does not permit agencies to do this because the potential for abuse is too great. Agencies with unlimited public funds should not be able to haul individual people who file a request under the public disclosure act into court. Rather, the agency response is limited to denying the public disclosure act request and waiting to see whether and when the requester decides to go to court.
>
> The trial court did not address this procedural issue, because it was moot after Cowles filed its own motion for a hearing on the merits. We mention it because it is likely to recur.
>
> The public disclosure act has an injunction provision for agencies. An agency asserting an exemption may seek a judicial ruling on the merits when either agency functions or individuals would be irreparably damaged by disclosure. This spares the agency the uncertainty and cost of delay, including the per diem penalties for wrongful withholding. It does not prejudice the requester. It is immaterial who hauls whom into court, because the requester who prevails in any court action over the release of public records is entitled to attorney fees.

Soter v. Cowles Publ'g Co., 131 Wn. App. 882, 907, 130 P.3d 840 (2006), *aff'd* 162 Wn.2d 716 (2007)(internal citations omitted).

In affirming this holding, the Supreme Court explained, assuming that the agency erred in its response, "the advantage to going to court is that the agency can obtain quick judicial review, curbing, but not eliminating, the accumulation of the per diem penalties." *Soter*, 162 Wn.2d at 765, *citation omitted.* As the Court further explained, the PRA permits an agency to deny a request and seek a judicial determination as to whether the denial was proper. *Id.*

In this case, the City claimed various exemptions to Mr. Koenig's request. Based on its prior interactions with Mr. Koenig, it asked him to confirm that he was satisfied with the City's response. When no satisfactory response was forthcoming, the City commenced the instant litigation to confirm its compliance, seeking confirmation that it had complied, which necessarily entails submission to a court that the City's claims of exemption were proper. Although Mr. Koenig (and future requestors) may find it unsettling to be defendants in PRA actions, the use of the UDJA in appropriate cases, and this is one of them, is entirely in line with *Soter*.

B. Discovery is Proper in a PRA Case and the Superior Court did not Abuse its Discretion.

1. Washington Law Makes no Distinction Propounding Parties in the Discovery Context.

Amicus' claim that agencies should not be entitled to propound discovery in PRA actions is at odds with both the applicable civil rules and with the cases interpreting those rules.

Civil Rule (CR) 26(a) begins simply, "Parties may obtain discovery by one or more of the following methods: ..." (Emphasis Added). CR 26(b), which governs the permissible scope of discovery likewise provides,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(Emphasis Added).

Our Supreme Court has also made clear, under CR 26(c), that "[u]pon motion by a party or by the person from whom discovery is sought ...," a protective order may be granted. (Emphasis added).

Plainly, the Civil Rules recognize that discovery is not limited to the appellation of a plaintiff, defendant, agency, requestor, etc. Rather any "party," may propound discovery. Case law is to the same effect, recognizing that each "party," has the right to conduct and respond to discovery:

> The inherent power to permit pretrial discovery is a matter peculiarly within the discretion of the trial court. In order to enhance the search for truth, trial courts are encouraged to exercise this discretion, bearing in mind that discovery should be considered a "two-way street."

State v. Mecca Twin Theater & Film Exch., 82 Wn.2d 87, 90, 507 P.2d 1165 (1973)(citations omitted).

Consistent with this "two-way street," any party in a PRA action has the right to conduct discovery under CR 26(a) and CR 26(b), and either party has the right to apply for a CR 26(c) protective order. The court rules make no distinction between who may propound discovery and who may seek a protective order. Neither should this Court.

2. Federal FOIA Case Law is Inapplicable.

Relying on federal authorities interpreting the Freedom of Information Act (FOIA), 5 U.S.C. § 552 – which has never been identified by either party either at the trial or appellate levels as authority – Amicus claims that discovery should not be permitted in state court PRA cases. While the interpretation "of a similar federal statute is persuasive authority, it is not controlling in our interpretation of a state statute." *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (*citing*, *Weeks v. Chief of the Washington State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982); *Young v. Seattle*, 25 Wn.2d 888, 894, 172 P.2d 222 (1946)). Reliance on FOIA as a discovery bar is inapplicable in this case for three distinct reasons. First, there are differences between the Washington Rules of Civil Procedure and the Federal Rules of Civil Procedure as to the scope of discovery. Second, the scope of issues in a FOIA lawsuit are narrower than those at issue in a PRA suit. Third, it is already implicit that PRA suits have a discovery component.

Although Washington courts look to the FOIA for guidance on substantive matters, the issue before this Court is a discovery dispute. Treated as a discovery dispute, the Washington court rules, however, depart significantly from their federal counterparts in discovery matters. It is "[w]here a state rule is identical to its federal counterpart, analyses of the federal rule provide persuasive guidance as to the application of our comparable state rule." *Soter*, 162 Wn.2d at 739 (*citing*, *Beal v. City of Seattle*, 134 Wn.2d 769, 777, 954 P.2d 237 (1998)).

First and foremost amongst these distinctions includes the timing, manner and sequencing of discovery. As noted above, any party may utilize the discovery process, subject to any timing, sequencing and protective orders which the trial court may impose. Discovery requests may be propounded concurrent with the service of process. CR 33(a); CR 34(b); CR 36(a). The federal rules differ, "[a] party may not seek discovery from any source before the parties have conferred ..., except in a proceeding exempt from initial disclosure ... or when authorized .., by stipulation, or by court order." Fed. R. Civ. P. 26(d)(1). Viewed appropriately in context, in the federal system, the parties must either agree to discovery, or the trial court shall arbitrate the timing and sequencing of discovery, all before the first discovery are exchanged.

This concern is not an idle one, and reflects the interplay between the parties and the Court when a discovery dispute does arise in Washington court proceedings. A party who seeks to avoid their discovery obligations may not simply avoid responding to that discovery; the party resisting discovery must affirmatively seek a protective order under CR 26(c). *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 354, fn 89, 858 P.2d 1054 (1993). The applicant for a protective order is required to affirmatively demonstrate "specific prejudice or harm will result if no protective order is issued." *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 149 Wn. App. 412, 423, 204 P.3d 944 (2009)(*citing*, *Dreiling v. Jain*, 151 Wn.2d 900, 916-17, 93 P.3d 861 (2004). "When possible, the party must use affidavits and concrete examples to demonstrate specific facts showing harm; broad or conclusory allegations of potential harm may not be enough." *McCallum*, 149 Wn. at 423. Amicus relies on the claim of the very "broad or conclusory allegations of potential harm," which *McCallum* identifies will not be sufficient to satisfy the initial burden under CR 26(c).

The FOIA line of case law is also inapplicable for another reason; in FOIA litigation, unlike the PRA, injunctive law suits, or so-called "reverse-FOIA" suits will not generally exist under FOIA. As noted, the PRA authorizes agencies to bring suits for declaratory relief or to enjoin

disclosure. *See Soter*, 162 Wn.2d at 749-756; RCW 42.56.540 (court protection of records); RCW 42.56.565 (inspection and protection by prisoners). No such injunctive provision exists in FOIA, and absent an independent federal basis, federal courts lack jurisdiction to enjoin a FOIA request because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a third-party "any right to enjoin agency disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979). Thus, by its very nature, the scope of issues in a state court PRA action can be very different than those issues which may arise under FOIA.

Finally, since the PRA was originally enacted in 1972, no final appellate opinion has taken up the issue which Mr. Koenig now raises. To-date, no final appellate opinion of this State has held that discovery may not be utilized under the PRA.[2] As the City has previously observed, this State's appellate courts continue to recognize otherwise in its opinions the otherwise unremarkable observation that PRA litigants continue to

[2] The only citation either in the record or to the briefs on file with this Court which the City can locate which even cites to the FOIA is in Mr. Koenig's Supplemental Brief in the context of explaining a decision from Division III. However, in preparing the instant brief, the City learned that the Supreme Court has granted review of this Division III decision suggesting a contrary result. *Neighborhood Alliance of Spokane County v. Spokane County*, 153 Wn.App. 241, 224 P.3d 775 (2009), *pet. for review granted*, 168 Wn.2d 1039 (June 2010). The issue of whether discovery is proper in the PRA context by a PRA plaintiff-requestor is identified as the first issue in Neighborhood Alliance's Petition for Review. *See, Petition for Review*, *Neighborhood Alliance of Spokane v. County of Spokane*, Wash. Supreme Ct. No. 84108-0. (Available on-line at: http://www.courts.wa.gov/content/Briefs/A08/841080%20prv.pdf).

engage in discovery. *See e.g., Koenig v. Pierce County*, 151 Wn. App. 221, 228, 211 P.3d 423 (2009)(2-day turnaround on interrogatories); *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 742, 218 P.3d 196 (2009)(denial of continuance to conduct discovery); *Sanders v. State*, 2010 Wash. LEXIS 810, ¶ 7 (Wash. Sept. 16, 2010)(Supreme Court justice in private PRA case claimed CR 30(b)(6) designees' testimony inconsistent with agency position).

CONCLUSION

None of the concerns raised by Amicus merit reversal of the decision of the Pierce County Superior Court.

DATED: October 4, 2010.

CITY OF LAKEWOOD,
HEIDI ANN WACHTER, CITY ATTORNEY

By: _____
MATTHEW S. KASER, WSBA # 32239
Associate City Attorney, City of Lakewood

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the foregoing Respondent's Reply to Amicus, by the following indicated methods:

Via email (by prior agreement) in PDF format to:

Christopher Rosaniec — *chris@alliedlawgroup.com*
Michelle Lynn Earl-Hubbard — *Michele@alliedlawgroup.com*
David M. Norman — *dnorman77@gmail.com*
Allied Law Group, LLC
2200 6th Ave, Suite 770
Seattle, WA 98121-1855

Attorneys for Amicus

Via email in PDF format and by ABC Legal Messenger to:

William John Crittenden — *wjcrittenden@comcast.net*
Attorney at Law
300 E. Pine St.
Seattle, WA 98122-2029

Attorney for Petitioner, David Koenig

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

Executed at Lakewood, Washington this 4th day of October, 2010.

Ann-Marie Evans

Ann-Marie Evans